NO. 01-18-00538-CR

IN THE
COURT OF APPEALS FOR THE
FIRST JUDICIAL DISTRICT OF TEXAS
AT HOUSTON

RICARDO ROMANO

V.

STATE OF TEXAS

Appealed from the
County Criminal Court at Law No. 6
of Harris County, Texas
Cause Number 2167075

APPELLANT'S BRIEF ON REMAND

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ORAL ARGUMENT NOT REQUESTED

IDENTITY OF THE PARTIES

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Appellee:	The State of Texas
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Trial Judge:	Honorable Larry Standley 1201 Franklin Houston, TX 77002

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STATEMENT OF THE CASE

Appellant waived a jury and pled not guilty to Class B misdemeanor indecent exposure in cause number 2167075 in the County Criminal Court at Law Number 6 of Harris County before the Honorable Larry Standley. After a bench trial, the court convicted him, assessed punishment at three days in jail and a $1,000 fine, and ordered him to register as a sex offender for ten years on May 18, 2018. Carl Haggard represented him at trial.

This Court vacated appellant's conviction and acquitted appellant in an unpublished opinion issued on October 8, 2019. *Romano v. State*, No. 01-18-00538-CR, 2019 WL 4936040 (Tex. App.—Houston [1st Dist.] 2019, pet. granted) (unpublished) (*Romano I*). The Court denied the State's motion for *en banc* rehearing. Present counsel represented appellant in this Court.

The Court of Criminal Appeals (CCA) granted the State's petition for discretionary review on May 6, 2020. It reversed the judgment of this Court and remanded for consideration of the remaining issues in a published opinion issued on October 28, 2020. *Romano v. State*, 610 S.W.3d 30 (Tex. Crim. App. 2020) (*Romano II*). Present counsel represented appellant in the CCA.

Appellant presents three unresolved issues on remand.

STATEMENT REGARDING ORAL ARGUMENT

Appellant does not request oral argument because the case involves the application of well-established caselaw. However, he eagerly would present oral argument should the Court believe that it would help the Court apply the CCA's decision to the remaining sufficiency issue on remand.

ISSUES PRESENTED

1. Whether the evidence that appellant exposed his genitals with intent to arouse or gratify the sexual desire of any person is legally insufficient to sustain his conviction for indecent exposure.

2. Whether the trial court reversibly erred in admitting a police officer's improper opinion that appellant lied when he said that he was urinating in a park and that the officer believed that he was masturbating.

3. Whether appellant was denied the effective assistance of counsel at the guilt-innocence stage when counsel mentioned, elicited, and failed to object to testimony about and references to appellant's inadmissible prior conviction for indecent exposure.

STATEMENT OF FACTS

A. The Information

On August 23, 2017, appellant allegedly unlawfully exposed his genitals to R. Gardiner with the intent to arouse and gratify appellant's sexual desire, and he was reckless about whether another person was present who would be offended and alarmed by the act, in that he masturbated in a public park (C.R. 7).

B. The State's Case

Houston Police Department Sergeant Ryan Gardiner was patrolling on horseback in Memorial Park, a public place in Houston, on August 23, 2017 (1 R.R. 9-10). He rode his horse to a remote part of the park about 10:30 a.m. and concealed himself behind trees and bushes (1 R.R. 11-12, 28).

Appellant parked his car in an empty parking lot in the park (1 R.R. 12, 48). No one else was in the lot or on the street, and no pedestrians or bicyclists were in the area (1 R.R. 30-31, 50). A bike trail was about 100 feet away from appellant's car (1 R.R. 31). Gardiner was suspicious of appellant because there were "very few reasons" to park there (1 R.R. 12).[1] Appellant exited, walked around and opened the passenger door, and went to the rear of his car (1 R.R. 13, 31-32).

Gardiner watched appellant through an opening in the wood line (1 R.R. 13). Gardiner testified that appellant pulled down the top of his shorts with one hand and began to masturbate with his other hand (1 R.R. 14, 32).[2] Gardiner asserted that he saw appellant's penis but did not know whether it was circumcised (1 R.R. 45). On Gardiner's body camera video recording of the incident, he stated that appellant started "messing with" his penis, and it "looked like" he was masturbating (1 R.R. 41; 3 R.R. SX 2). Gardiner assumed that appellant was doing

[1] Gardiner did not explain why it was suspicious to park a car in a parking lot in a public place in the middle of the day.

[2] Gardiner had binoculars but did not use them after appellant parked (1 R.R. 33, 38-39).

this to gratify himself (1 R.R. 14). Gardiner called his partner over the radio and rode his horse toward appellant as soon as he saw appellant touch his penis (1 R.R. 14, 43-44). About one minute transpired from when appellant pulled into the parking lot until Gardiner called his partner (1 R.R. 40-41).

Appellant saw Gardiner approaching and reached into the car (1 R.R. 15). Gardiner arrested appellant for indecent exposure at 12:17 p.m. (1 R.R. 15, 28-29). Appellant immediately denied masturbating, said that he was trying to urinate, and asked Gardiner to review his body camera video footage to confirm what appellant claimed (1 R.R. 15, 41-42). Appellant asked Gardiner why he would masturbate with no one around (1 R.R. 45). Gardiner did not see any urine on the ground, and a restroom was across the street (1 R.R. 15-16). Gardiner searched appellant's car but did not find anything that could be used to aid masturbation (1 R.R. 39-40).

Gardiner was the only person who saw appellant touch his penis but testified that there was a risk that other pedestrians and motorists in the park *could have* seen appellant, and he opined that appellant disregarded that risk (1 R.R. 16-17). Gardiner admitted that appellant's car may have blocked anyone using the bike trail from seeing appellant (1 R.R. 33).

C. The Defense's Case

Appellant, age 48, stopped his car in Memorial Park to review some paperwork on his way downtown (1 R.R. 56-58). He parked near some bushes on

the edge of a parking lot and exited to urinate by his car (1 R.R. 58-59, 64). He did not believe that it was reckless to urinate there, and he was not masturbating (1 R.R. 59-60). As soon as he pulled out his penis, he heard branches move (1 R.R. 60-61). No one was around, and he suspected that someone was behind the bushes (1 RR. 61). He did not actually urinate because Gardiner emerged before he could do so (1 R.R. 62). He did not expect to see anyone there, and no one else was in that area of the park other than Gardiner (1 R.R. 63).

D. The Closing Arguments

The prosecutor argued in summation that Gardiner "was convinced" that he saw appellant masturbate (1 R.R. 69). Defense counsel replied that Gardiner was mistaken about what he saw because he was too far from appellant (1 R.R. 69-70). No one was present other than Gardiner, who was hiding in the bushes. Appellant was not reckless about whether someone was present who would be offended and alarmed, no matter what he was doing (1 R.R. 70-71).

E. The Verdict and Sentence

The trial court convicted appellant of indecent exposure, assessed punishment at three days in jail and a $1,000 fine, and ordered him to register as a sex offender for ten years (C.R. 59-62; 1 R.R. 71; 2 R.R. 19-21, 24). The court stated that the prosecution's direct examination of Gardiner "wasn't the best" but that the verdict "boiled down to credibility" (1 R.R. 77).

F. This Court's Decision On Appeal

Appellant raised three issues on appeal. The first issue—that the evidence was legally insufficient to sustain the conviction—was based on two different theories. First, he asserted that the evidence was insufficient to establish the element of the offense that he exposed his genitals with intent to arouse or gratify the sexual desire of any person. Second, he contended that the evidence was insufficient to establish the element that he was reckless about whether another person was present who would be offended or alarmed by his exposure of his genitals. This Court addressed only the second theory and, based on "undisputed, objective evidence," held that the evidence was legally insufficient to establish that he acted recklessly about whether another person was present. *Romano I*, 2019 WL 4936040, at *6. It vacated the conviction and issued an appellate acquittal.

The Court did not address whether the evidence was sufficient to establish that appellant exposed his genitals to Gardiner with intent to arouse or gratify the sexual desire of any person. Nor did it address the other two issues that appellant raised: (1) that the trial court reversibly erred in admitting Gardiner's improper personal opinion that appellant lied when he said that he was urinating in a park and that Gardiner believed that he was masturbating; and (2) that trial counsel was ineffective when he mentioned, elicited, and failed to object to testimony about and references to appellant's inadmissible prior conviction for indecent exposure.

G. The Court Of Criminal Appeals' Decision On Discretionary Review

The CCA granted the State's petition for discretionary review to decide whether this Court misapplied the standard for reviewing the legal sufficiency of the evidence. It held that this Court did not properly defer to the trial court's verdict, reversed this Court's judgment, and remanded for consideration of the remaining issues. *Romano II*, 610 S.W.3d at 31, 36. Specifically, the CCA concluded that appellant's location in a public park in Houston on a clear day was sufficient to establish that he was reckless about whether another person was present who would be offended or alarmed by his exposure of his genitals. *Id*. at 36. Assuming without deciding that the evidence was sufficient to establish that he was masturbating, the CCA essentially determined that a person acts recklessly as a matter of law if he masturbates in a public park in broad daylight. *Id*.

Importantly, the CCA did not consider or determine whether the evidence was sufficient to establish the essential element that appellant acted with intent to arouse or gratify the sexual desire of any person. The CCA only considered recklessness as to a circumstance of the offense—whether another person was present who would be offended or alarmed by his conduct. It did not consider whether the evidence was sufficient to establish that appellant acted intentionally as to the nature of the offense. In short, the critical issue on remand is whether the State proved that appellant was masturbating.

The CCA's directive to this Court to consider appellant's remaining issues requires resolution of the alternative theory that the evidence was legally insufficient, as well as the evidentiary and the ineffective assistance issues. *Cf. Carmell v. State*, 331 S.W.3d 450, 458 (Tex. App.—Fort Worth 2010, pet. ref'd) ("[W]hen a court of appeals reverses a judgment without ruling on all grounds raised on appeal, and the court of criminal appeals reverses and remands to the court of appeals, the court of appeals is not limited on remand to considering only the issue the court of criminal appeals reviewed and reversed; the court of appeals on remand may even review unassigned error that was preserved in the trial court and reverse on that basis.").

SUMMARY OF THE ARGUMENT

The evidence is legally insufficient to sustain appellant's conviction for indecent exposure. No rational trier of fact could have found beyond a reasonable doubt that appellant exposed his genitals with intent to arouse or gratify his sexual desire. The police officer's body camera video, which depicts his view of the incident, unequivocally does not demonstrate that appellant was masturbating, as opposed to preparing to urinate. This Court may not defer to the trial court's verdict because the evidence, even when viewed in the light most favorable to the prosecution, does not support the finding that appellant acted with intent to arouse or gratify his sexual desire. The trial court's inferences and credibility

determinations on this essential element are unreasonable in light of the undisputed video evidence of what the officer saw. The trial court abdicated its responsibility to fairly resolve the conflicts in the testimony, weigh the evidence, and draw reasonable inferences. The combined and cumulative force of the incriminating circumstances is not legally sufficient to sustain the conviction. This Court must set aside the judgment of conviction and issue an appellate acquittal.

The trial court reversibly erred in admitting the police officer's improper opinion that appellant lied when he said that he was urinating and that the officer believed he was masturbating. A witness may not opine about the truth or falsity of another witness's testimony, and a police officer may not opine that the defendant is guilty. The error affected appellant's substantial rights because the prosecutor asserted, and appellant agreed, that the case turned on the conflict between his testimony that he was urinating and the officer's testimony that he was masturbating; and the trial court stated that the verdict "boiled down to credibility." This Court must set aside the conviction and remand for a new trial.

Appellant was denied the effective assistance of counsel during the guilt-innocence stage of trial because counsel mentioned, elicited, and failed to object to testimony about and references to appellant's inadmissible prior conviction for indecent exposure. The prior conviction was inadmissible because it was remote. Counsel's strategy to allow the court to hear about it to explain why appellant did

not use a public restroom to urinate was unsound under the circumstances. No evidence could have prejudiced appellant more than allowing the trier of fact to learn that he previously was convicted of the same offense. The court may well have convicted him of the charged offense because it knew about his prior conviction. Counsel was ineffective in this regard, and this Court must set aside the conviction and remand for a new trial.

FIRST POINT OF ERROR

THE EVIDENCE THAT APPELLANT EXPOSED HIS GENITALS WITH INTENT TO AROUSE OR GRATIFY THE SEXUAL DESIRE OF ANY PERSON IS LEGALLY INSUFFICIENT TO SUSTAIN HIS CONVICTION FOR INDECENT EXPOSURE.

STATEMENT OF FACTS

The pertinent facts are set forth *supra* at pages 2-5.

ARGUMENT AND AUTHORITIES

A person commits the offense of indecent exposure if he exposes any part of his genitals with intent to arouse or gratify the sexual desire of any person, and he is reckless about whether another is present who will be offended or alarmed by his act. TEX. PENAL CODE § 21.08(a) (West 2018). "Expose" means to lay open to view. *McGee v. State*, 804 S.W.2d 546, 547 (Tex. App.—Houston [14th Dist.] 1991, no pet.).

Appellant concedes that he exposed his genitals, as he admitted that he

removed his penis from his shorts to urinate (1 R.R. 66). However, the evidence was legally insufficient to establish the essential element of the offense that he did so with intent to arouse or gratify the sexual desire of any person.

A. Standard Of Review

The resolution of this issue turns on whether the Court honors United States Supreme Court and CCA precedent on the standard for reviewing the legal sufficiency of evidence to sustain a conviction. If so, then it must vacate the conviction and issue an appellate acquittal.

This Court knows by heart the basic standard of review:

> A challenge to the legal sufficiency of the evidence requires the appellate court to consider the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

The State may prove criminal culpability by either direct or circumstantial evidence, coupled with all reasonable inferences from that evidence. *Gardner v. State*, 306 S.W.3d 274, 285 (Tex. Crim. App. 2009). It must prove both the requisite culpable mental state and the prohibited act to convict the defendant. *Bounds v. State*, 355 S.W.3d 252, 255 (Tex. App.—Houston [1st Dist.] 2011, no pet.). A culpable mental state can be inferred from the acts, words, and conduct of the defendant. *Patrick v. State*, 906 S.W.2d 481, 487 (Tex. Crim. App. 1995).

This marks the usual end of the discussion of the standard of review. But

where the CCA granted discretionary review in appellant's case to determine whether this Court correctly applied the sufficiency standard of review, counsel expected a robust discussion of that standard in the CCA's opinion. Instead, that court wrote only four sentences about the standard that it concluded this Court misapplied. *Romano II*, 610 S.W.3d at 34. One sentence in particular caught counsel's eye and merits deeper attention here. The CCA wrote without elaboration, "An appellate court must defer to the fact-finder's findings . . . ." *Id*. (citing *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007)). That assertion suggests that every finding by a trier of fact is entitled to absolute appellate deference. But that is not the law because appellate courts do not defer to findings that are not supported by credible record evidence.

Hooper clearly sets forth, step-by-step, how appellate courts must review legal sufficiency claims. The CCA's opinion in appellant's case omitted the following well-settled characteristics of that standard of review:

- inferences made by the trier of fact from the evidence must be *reasonable*, 214 S.W.3d at 13 (citing *Jackson*, 443 U.S. at 318-19);
- the trier of fact has a "*responsibility . . . to fairly resolve conflicts* in testimony, to weigh the evidence, and to draw *reasonable* inferences from basic facts to ultimate facts," *id*. (emphasis added);
- "the *cumulative force* of all the incriminating circumstances [must be]

sufficient to support the conviction," 214 S.W.3d at 13 (citations omitted) (emphasis added);

- the trier of fact may draw "reasonable inferences as long as each inference is supported by the evidence presented at trial," 214 S.W.3d at 15; and
- the trier of fact is "not permitted to come to conclusions based on *mere speculation or factually unsupported inferences* or presumptions," *id.*

The *Hooper* Court concluded squarely and succinctly, "courts of appeals should adhere to the *Jackson* standard and determine whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict." 214 S.W.3d at 16-17.

B. The Evidence Is Legally Insufficient To Establish That Appellant Exposed His Genitals With Intent To Arouse Or Gratify His Sexual Desire.

If this Court treats the *Jackson* standard as its North Star, it will conclude that the trial court's finding that appellant acted with intent to arouse or gratify his sexual desire is not entitled to deference. That finding was an unreasonable inference based on mere speculation and contradicted by undisputed, credible video evidence.

A person commits the offense of indecent exposure if, *inter alia*, he exposes any part of his genitals with intent to arouse or gratify the sexual desire of any

person. Thus, if appellant exposed his genitals without intending to arouse or gratify the sexual desire of any person, he did not commit indecent exposure. If he exposed his penis to urinate, he did not intend to arouse or gratify the sexual desire of any person. However, if he exposed his genitals to masturbate, he intended to arouse or gratify someone's sexual desire. The resolution of this element turned on whether the evidence was sufficient to establish that he was masturbating.

Thank goodness for the advent of police body cameras. If there were not a body camera video recording of the incident depicting exactly what Sergeant Gardiner saw from his perspective, then the Court would have to rely exclusively on Gardiner's testimony to resolve this issue. Although he testified that he saw appellant masturbating (1 R.R. 14, 16, 32), he stated at the time of the incident that appellant started "messing with" his penis, and it "looked like" he was masturbating (1 R.R. 41; 3 R.R. SX 2). That admission constitutes mere speculation, not a reasonable inference. Given the distance from which he viewed appellant—which was substantial—and his limited sight line that was obscured by tree branches and bushes, his assertions that appellant started "messing with" his penis and that it "looked like" he was masturbating are equally consistent with removing his penis from his shorts and holding it to urinate. Alas, the Court need not rely solely on Gardiner's testimony.

Fortunately, Gardiner's body camera video depicts that he could not and did

not, in fact, see that appellant was masturbating (3 R.R. SX 2). The video, which is of excellent quality, shows that Gardiner was too far away from appellant to see what he was doing and that Gardiner could not have seen that appellant was masturbating, even if he was. The video unequivocally demonstrates that the area was vast and completely unoccupied by anyone other than appellant. The tree branches and bushes obscured Gardiner's view. It was impossible for him to determine that appellant was masturbating. With the benefit of the video, the Court cannot credit Gardiner's testimony over what the video actually depicts. Even the CCA acknowledged that Gardiner claimed to see conduct that the video did not corroborate: "The actions seen and described by Sergeant Gardiner were not all captured by the body camera because foliage behind which he concealed himself obscured some of the view." *Romano II*, 610 S.W.3d at 32, n.2.

The CCA has held that, when a "videotape presents indisputable visual evidence contradicting essential portions of [a police officer's] testimony," an appellate court must not defer to the trial court's explicit or implicit findings based on the officer's inconsistent testimony. *Carmouche v. State*, 10 S.W.3d 323, 332 (Tex. Crim. App. 2000) (declining to defer to trial court's ruling where indisputable visual evidence contradicted implied fact findings). *See also Tucker v. State*, 369 S.W.3d 179, 186 (Tex. Crim. App. 2012) (where testimony conflicted, court of appeals should have viewed video evidence to determine whether totality

of evidence supported trial court's ruling); *id.* at 187 (Alcala, J., concurring) (citing *Carmouche*, "when evidence is conclusive, such as a written and signed stipulation of evidence *or 'indisputable visual evidence,'* then any trial-court findings inconsistent with that conclusive evidence may be disregarded as unsupported by the record, even when that record is viewed in a light most favorable to the trial court's ruling.") (emphasis added).

Although *Carmouche* and *Tucker* concerned a trial court's fact findings in the context of a pretrial motion to suppress evidence, their logic fully applies to an appellate court's review of whether legally sufficient evidence supports a conviction. *See Love v. State*, 73 N.E.3d 693, 695 (Ind. 2017) (citing *Carmouche*, "We hold that Indiana appellate courts reviewing the sufficiency of evidence must apply the same deferential standard of review to video evidence as to other evidence, unless the video evidence indisputably contradicts the trial court's findings."). *Cf. Scott v. Harris*, 550 U.S. 372, 378-81 (2007) (considering indisputable video evidence to reverse lower court's refusal to grant summary judgment for police officer in civil rights lawsuit; "Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape.").

Gardiner's body camera video indisputably contradicts and, therefore,

completely undermines the credibility of his testimony. The body camera was located on his chest, mere inches below his eye level. It offered an excellent, if not identical, depiction of his perspective. Furthermore, the video clearly demonstrates the limitations on his vantage point because of the bushes and trees that impeded his view of appellant.

The body camera also demonstrates the substantial distance between Gardiner and appellant during the incident. Although no evidence established the exact distance between them, this Court can make reasonable deductions from the record. The video (SX 2) shows Gardiner on his horse galloping at a high speed for 12 seconds—from 2:27 to 2:39—before he encountered appellant near the car. Assuming that the horse galloped—conservatively estimated at 25 miles per hour[3]—it traveled nearly 147 yards (440 feet) before it reached appellant.[4] Even if the horse cantered or loped—a three-beat gait slower than a gallup but faster than a trot—at a conservative 12 miles per hour, it traveled 70 yards (211 feet) before

[3] Ordinary horses—other than professional race horses—typically run between 25 to 30 miles per hour. *See, e.g., Speed of Animals: Horses,* http://www.speedofanimals.com/animals/horse ("The gallop averages 40 to 48 kilometres [sic] per hour (25 to 30 mph).").

[4] A horse galloping 25 miles per hour for 12 seconds would travel nearly 37 feet per second, which is more than 12 yards per second, for a total of 147 yards over 12 seconds. (To convert a speed value from miles per hour to feet per second, multiply it by 5,280, then divide by 3,600.) *See How to Covert Miles Per Hour to Feet Per Second,* https://sciencing.com/convert-mph-feet-per-second-2306812.html.

reaching appellant.[5] Gardiner admitted that he did not use his binoculars to watch appellant from the bushes (1 R.R. 33, 38-39). It was impossible for him to determine with his naked eye, particularly with a sight line obscured by bushes and tree branches, that appellant was masturbating from a distance of at least 70 yards and potentially more than 150 yards.

The video recording establishes two additional, relevant, indisputable facts. First, immediately after arresting appellant, Gardiner falsely asserted that he watched appellant from the bushes through his binoculars.[6] Because the video establishes that Gardiner could not see appellant masturbating, he apparently made this false statement hoping that appellant would admit that he was masturbating when told that Gardiner saw him doing so through binoculars. But appellant made no such admission. Indeed, he denied masturbating. Gardiner's claim that he used binoculars also verifies how far he was from appellant. He would not have needed to assert that he used binoculars to watch appellant unless the bushes in which he hid were too far to watch appellant with the naked eye. Stated otherwise, Gardiner knew that appellant would not believe that he saw appellant masturbating from such a far distance unless appellant believed that Gardiner used binoculars. It

[5] *Speed of Animals: Horses*, http://www.speedofanimals.com/animals/horse ("the canter or lope (a three-beat gait that is 19 to 24 kilometres [sic] per hour (12 to 15 mph)").

[6] Gardiner's lie appears around 9:49 to 9:52 on the video recording (SX 2). He also admitted at trial that he falsely stated in his offense report that he watched appellant masturbate through his binoculars (1 R.R. 33).

should not surprise this Court that Gardiner lied to appellant about using binoculars where he also lied to the trial court that he could see appellant masturbate from the bushes. Thankfully, the video depicts the truth.

The second indisputable fact established by the video is that, after Gardiner lied about using binoculars, appellant asked *three times* to watch the video recording because it would exonerate him.[7] A guilty person who was told that he was video-recorded while committing a crime would not repeatedly insist that the arresting officer review the recording of the incident. Appellant's insistence that Gardiner watch the recording—despite being told falsely that Gardiner saw him masturbate through binoculars—is strong circumstantial evidence of his innocence. *See United States v. Smith*, 739 F.3d 843, 845 (5th Cir. 2014) ("In determining whether the evidence is sufficient to sustain a conviction, . . . [this Court] consider[s] the *countervailing evidence* as well as the evidence that supports the verdict.") (citations and internal quotation marks omitted) (emphasis added).

The video recording flatly contradicts the State's only witness at trial and contains exculpatory evidence. It rebuts Gardiner's testimony and establishes that no rational trier of fact could have found *beyond a reasonable doubt* that appellant exposed any part of his genitals with intent to arouse or gratify his sexual desire. The evidence was legally insufficient to establish that he committed the offense of

[7] Appellant asked to see the video at about 9:53, 9:58, and 10:40 (SX 2).

indecent exposure. The trial court's inferences to support this essential element were unreasonable based on the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict. *Hooper*, 214 S.W.3d at 16-17. This Court must vacate the judgment of conviction and issue an appellate acquittal. *Cf. Beasley v. State*, 906 S.W.2d 270, 272 (Tex. App.—Beaumont 1995, no pet.) (legally insufficient evidence of exposure element, although defendant naked below waist, where complainant did not see genitals because defendant's hand "shielded" penis).

SECOND POINT OF ERROR

THE TRIAL COURT REVERSIBLY ERRED IN ADMITTING A POLICE OFFICER'S IMPROPER PERSONAL OPINION THAT APPELLANT LIED WHEN HE SAID THAT HE WAS URINATING IN A PARK AND THAT THE OFFICER BELIEVED THAT HE WAS MASTURBATING.

STATEMENT OF FACTS

Gardiner watched appellant from behind the trees and bushes through an opening in the wood line (1 R.R. 13). After appellant exited his car, he pulled down the top of his shorts with one hand and began to masturbate with his other hand (1 R.R. 14, 32). Gardiner had binoculars but did not use them at that time (1 R.R. 33, 38-39). Gardiner stated on the video that appellant started "messing with" his penis, and it "looked like" he was masturbating (1 R.R. 41; 3 R.R. SX 2). Gardiner assumed that appellant was doing this to gratify himself (1 R.R. 14).

Immediately after the arrest, appellant denied masturbating and said that he was trying to urinate (1 R.R. 15). The prosecutor asked Gardiner, "Did you believe this?" He replied, "No." The court overruled counsel's objection to Gardiner's improper opinion—"to his belief."

ARGUMENT AND AUTHORITIES

A. The Trial Court Erred In Admitting Evidence Of A Police Officer's Improper Personal Opinion That Appellant Was Not Truthful.

A witness may not give an opinion regarding the truth or falsity of another witness's testimony. *See, e.g., Miller v. State,* 757 S.W.2d 880, 883 (Tex. App.—Dallas 1988, pet. ref'd).[8] Police opinion testimony that appellant was not telling the truth, and by inference that the police believed that he committed indecent exposure, was inadmissible under Rule of Evidence 702. *Cf. Schutz v. State*, 957 S.W.2d 52, 59-60, 70, 73 (Tex. Crim. App. 1997) (expert testimony that child sexual assault complainant did not exhibit any evidence of fantasizing and that allegations were not result of fantasy constituted inadmissible opinions on truth of allegations). The State cannot properly elicit over objection the opinion testimony

[8] Texas courts have consistently reversed convictions for sex offenses where a witness improperly expressed the opinion that the complainant was telling the truth, had been sexually assaulted, or was incapable of fantasizing about the type of sexual conduct allegedly committed against her. *Farris v. State,* 643 S.W.2d 694 (Tex. Crim. App. 1982) (psychiatrist); *Black v. State*, 634 S.W.2d 356 (Tex. App.—Dallas 1982, no pet.) (counselor at rape crisis center); *Kirkpatrick v. State,* 747 S.W.2d 833 (Tex. App.—Dallas 1987, pet. ref'd) (psychologist); *Martin v. State,* 819 S.W.2d 552 (Tex. App.—San Antonio 1991, no pet.) (DHS caseworker); *Yount v. State,* 872 S.W.2d 706 (Tex. Crim. App. 1993) (pediatrician); *Matter of G.M.P.*, 909 S.W.2d 198 (Tex. App.—Houston [14th Dist.] 1995, no writ) (police detective).

of a police officer that a defendant is guilty. *Cf. Prince v. State*, 20 S.W. 582, 583 (Tex. Crim. App. 1892) (witness cannot testify to belief that defendant not guilty); *Boyde v. State*, 513 S.W.2d 588, 590 (Tex. Crim. App. 1974) (reversible error to elicit police officer's opinion that defendant guilty). A police officer cannot testify that he found evidence to connect the defendant to the offense, *Tillery v. State*, 5 S.W. 842, 845 (Tex. App. 1887); that he believes that the defendant is guilty, *Parham v. State*, 244 S.W.2d 809, 809 (Tex. Crim. App. 1952); or that he has never filed a complaint against someone whom he thought was not guilty. *Clay v. State*, 276 S.W.2d 843, 845 (Tex. Crim. App. 1955).[9] Defense counsel would have been ineffective had he failed to object to this testimony. *Weathersby v. State*, 627 S.W.2d 729, 730-31 (Tex. Crim. App. 1982) (counsel ineffective in failing to object to inadmissible police opinion testimony that defendant guilty).

Gardiner was not qualified as an expert on masturbation, urination, or determining whether a person is truthful. He could not properly give an expert opinion that appellant was untruthful when he denied masturbating and said that he was urinating. Rather, it was the court's role as the factfinder to observe and assess appellant's credibility based on the court's own experience with masturbation, urination, and determining credibility. "Clearly, there is nothing to

[9] *See also United States v. McKoy*, 771 F.2d 1207 (9th Cir. 1985) (prosecutor called to testify to circumstances surrounding accomplice's plea bargain improperly gave opinion that case against defendant was extremely strong).

be gained by permitting a witness to proffer an opinion on a subject when any other person in the courtroom, any member of the jury, could form an opinion on the issue equally readily and with the same degree of logic as the witness." *Holloway v. State,* 613 S.W.2d 497, 500 (Tex. Crim. App. 1981). Stated more simply, the court does not need the opinion of a witness for what "any fool can plainly see." *Cooper v. State,* 23 Tex. 331, 342-43 (1859). An opinion that amounts to little more than a witness choosing sides on the outcome of the case is inadmissible because it is not helpful. *Mowbray v. State,* 788 S.W.2d 658, 668 (Tex. App.—Corpus Christi 1990, pet. ref'd). Accordingly, the trial court erred in overruling appellant's objection to Gardiner's improper opinion that appellant was untruthful about the ultimate issue.

B. Harm

The erroneous admission of improper opinion testimony is non-constitutional error. This Court must disregard the error if it did not affect appellant's substantial rights. TEX. R. APP. P. 44.2(b); *Barshaw v. State,* 342 S.W.3d 91, 93 (Tex. Crim. App. 2011). A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. *Coble v. State,* 330 S.W.3d 253, 280 (Tex. Crim. App. 2010). Non-constitutional error is harmless unless "the reviewing court has grave doubt that the result of the trial was free from the substantial effect of the error." *Barshaw,* 342

S.W.3d at 94. In making this determination, the Court reviews the record as a whole. The burden to demonstrate harm does not rest on appellant.

Gardiner's opinion that appellant was dishonest about the most important issue in the case affected his substantial rights because it was highly prejudicial and attacked appellant's credibility. The prosecutor asked appellant, "[T]he main issue in this case is you're saying you were urinating and the officer is saying you're masturbating?" (1 R.R. 66). Appellant agreed that the case turned on that issue. When announcing the verdict, the court stated that the prosecution's direct examination of Gardiner "wasn't the best" but that the verdict "boiled down to credibility" (1 R.R. 77).

Where the outcome of the trial depended on the credibility of appellant versus Gardiner, as well as the inconclusive police video footage, the erroneous admission of Gardiner's improper opinion on the ultimate issue had a substantial and injurious effect or influence on the verdict. Accordingly, this error harmed appellant's substantial rights. TEX. R. APP. P. 44.2(b); *see Aguilera v. State*, 75 S.W.3d 60, 66 (Tex. App.—San Antonio 2002, pet. ref'd) (improper admission of expert testimony regarding truthfulness of complainant's allegations adversely affected defendant's substantial rights and required new trial). The Court must set aside the judgment and remand for a new trial.

THIRD POINT OF ERROR

APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT-INNOCENCE STAGE WHEN COUNSEL MENTIONED, ELICITED, AND FAILED TO OBJECT TO TESTIMONY ABOUT AND REFERENCES TO APPELLANT'S INADMISSIBLE PRIOR CONVICTION FOR INDECENT EXPOSURE.

STATEMENT OF FACTS

Six weeks before trial, counsel filed a motion in limine seeking to exclude, *inter alia*, evidence that appellant previously was arrested or convicted of any crimes (C.R. 35). Three weeks before trial, the State gave notice of its intent to use evidence of appellant's prior conviction for indecent exposure in 1999 (C.R. 50). The court granted the motion in limine (C.R. 55-58).

On cross-examination of Sergeant Gardiner, defense counsel attempted to establish the reason why appellant did not use the public restroom across the street to urinate (1 R.R. 42-43). Counsel elicited from Gardiner that appellant said that he did not want to go there, but Gardiner did not remember his reason. Counsel asserted that appellant "talked about it being smelly," to which Gardiner replied, "Okay." Counsel then engaged in the following exchange (1 R.R. 43):

Q. Did you know he was previously arrested at a bathroom in 1999?

A. Well –

Q. You looked it up, his record?

A. I know now, yes.

On redirect examination, the prosecutor then asked Gardiner without objection, "[A]t that point [the arrest] did you know that the defendant had a prior conviction for indecent exposure?" (1 R.R. 47). Gardiner replied no.

Counsel asked appellant about public bathrooms (1 R.R. 63):

> Q. Everybody knows about Memorial Park and the bathrooms. Men are arrested for Indecent Exposure who meet – like the officers were saying – they meet out there, and they go into the woods or something or the bathroom. So why were you wanting [to] avoid the bathroom?
>
> A. Well, prior conviction. I just – I wanted nothing to do with that kind of bathroom.

The prosecutor then elicited from appellant on cross-examination without objection that he had a prior conviction for indecent exposure from 1999 (1 R.R. 65).

ARGUMENT AND AUTHORITIES

A. Standard Of Review

Appellant had a right to the effective assistance of counsel at trial. U.S. CONST. amends. VI and XIV; *Powell v. Alabama*, 287 U.S. 45 (1932). Counsel must act within the range of competence demanded of counsel in criminal cases. *McMann v. Richardson*, 397 U.S. 759 (1970).

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court established the federal constitutional standard to determine whether counsel rendered reasonably effective assistance. The defendant first must show that counsel's performance was deficient—that counsel made errors so serious that he

was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense—that counsel's errors were so serious as to deprive the defendant of a fair trial with a reliable result.

The defendant must identify specific acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The reviewing court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the range of professionally competent assistance. Ultimately, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The defendant need not show a reasonable probability that, but for counsel's errors, he would have been acquitted, received a mistrial as a result of a deadlocked jury, or had his conviction reversed on appeal. Rather, the issue is whether he received a fair trial resulting in a verdict worthy of confidence. Id.

An appellate court cannot resolve an ineffective assistance of counsel claim on direct appeal without an adequate record. *Thompson v. State*, 9 S.W.3d 808, 813-14 (Tex. Crim. App. 1999). However, where counsel's ineffectiveness is apparent from the record, an appellate court may address and dispose of the claim

on direct appeal. *Massaro v. United States*, 538 U.S. 500, 508 (2003); *Robinson v. State*, 16 S.W.3d 808, 813 (Tex. Crim. App. 2000). This disposition alleviates the unnecessary judicial redundancy and burden on trial courts of holding additional hearings in writ applications when no additional evidence is necessary to dispose of the case. *Thompson*, 9 S.W.3d at 817 (Meyers, J., dissenting).

An appellate court must presume that counsel's performance was based on a sound trial strategy. *Strickland*, 466 U.S. at 689. However, appellant can rebut that presumption if the court can determine from the record that counsel's performance was not based on sound trial strategy. *Ramirez v. State*, 987 S.W.2d 938, 944-45 (Tex. App.—Austin 1999, no pet.). The conviction must be reversed where "the record demonstrates that no plausible purpose was served by counsel's failure to object . . . ." *Id.* at 945. *See also Robertson v. State*, 187 S.W.3d 475, 484 (Tex. Crim. App. 2006) (introducing defendant's prior convictions that were inadmissible because on appeal); *Andrews v. State*, 159 S.W.3d 98 (Tex. Crim. App. 2005) (failing to object to improper argument harmful to defendant); *Stone v. State*, 17 S.W.3d 348, 353 (Tex. App.—Corpus Christi 2000, pet. ref'd) (eliciting testimony regarding defendant's inadmissible murder conviction cannot be sound trial strategy); *Mares v. State*, 52 S.W.3d 886, 893 (Tex. App.—San Antonio 2001, pet. ref'd) (failing to object to probation officer's testimony that defendant was not good candidate for probation was contrary to strategy of obtaining probation);

Storr v. State, 126 S.W.3d 647, 653 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd) (failing to request punishment instruction on voluntary release of kidnap victim in safe place cannot be sound trial strategy).

B. Deficient Performance

Evidence of appellant's 18-year-old conviction for Class B misdemeanor indecent exposure would have been inadmissible had the State offered it in the first instance because more than ten years had elapsed since the date of conviction. TEX. R. EVID. 609(b).[10] "Remote convictions are inadmissible because of a presumption that one is capable of rehabilitation and that his character has reformed over a period of law abiding conduct." *Morris v. State*, 67 S.W.3d 257, 263 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd).

Having determined that appellant's prior indecent exposure conviction was inadmissible, this Court next determines if counsel had a sound strategic reason for mentioning it in the first place, eliciting it, and then failing to object to testimony and references to it. The record suggests that counsel intended to introduce the prior conviction to explain why appellant did not use the public restroom across the street to urinate. The question is whether that strategy was objectively reasonable. The Court can decide this issue even though there was not a motion for new trial at

[10] Rule 609(a) would not have prohibited the admission of the prior conviction because indecent exposure is a crime of moral turpitude. *Tristan v. State*, 393 S.W.3d 806, 812-13 (Tex. App.—Houston [1st Dist.] 2012, no pet.).

which counsel provided an explanation because his conduct served no plausible purpose. *Ramirez*, 987 S.W.2d at 944-45.

This case is controlled by *Lyons v. McCotter*, 770 F.2d 529 (5th Cir. 1985), and *Ex parte Menchaca*, 854 S.W.2d 128 (Tex. Crim. App. 1993). In *Lyons*, the defendant was charged with aggravated robbery. The State elicited without objection that he had previously been convicted of robbery. The Fifth Circuit held that counsel performed deficiently in failing to object. "To pass over the admission of prejudicial and arguably inadmissible evidence may be strategic; to pass over the admission of prejudicial and clearly inadmissible evidence, as here, has no strategic value." *Lyons*, 770 F.2d at 534. "We can hardly imagine anything more prejudicial to [the defendant] than allowing the jury in his armed robbery case to hear the prosecutor's comments that [he] had been convicted twice before of burglary and once on drug charges. The jury may well have convicted [him] of the charged offense because it was aware of his prior convictions." *Id.*

Similarly, in *Menchaca*, the defendant was charged with delivery of a controlled substance. 854 S.W.2d at 128. The State elicited on cross-examination of the defendant without objection that he previously had been convicted of rape. *Id.* at 129. The prior conviction was inadmissible because he received probation, and the period of probation expired without revocation, so it was not a final conviction. *Id.* at 131. The jury's verdict turned on the defendant's credibility,

and the evidence of his prior rape conviction caused the jury not to believe his testimony because the jury had to weigh his credibility against the State's primary witness. *Id*. at 132-33. His prior conviction "permeated the entire guilt-innocence phase." *Id*. at 133. The Court of Criminal Appeals concluded that counsel performed deficiently in failing to object to the inadmissible prior conviction, which undermined the defendant's credibility, "which was at the very heart of his defense." *Id*. Counsel's conduct could not be considered sound. *Id*. Because counsel's deficient performance caused prejudice, he was ineffective, and the Court granted habeas corpus relief and set aside the conviction.

Likewise, appellant's counsel performed deficiently in mentioning, eliciting, and failing to object to testimony about and references to appellant's inadmissible prior conviction for indecent exposure. No sound strategy could justify this conduct, especially where the prior conviction was for the same offense as the charged offense. The extreme prejudice that resulted from the court's learning that appellant previously was convicted of the same offense outweighed any possible benefit that flowed from explaining why he did not use the public restroom. Counsel performed deficiently because his strategy was plainly unreasonable.

C. Prejudice

There is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S.

at 694. Appellant need not show a reasonable probability that, but for counsel's errors, he would have been acquitted, received a mistrial as a result of a deadlocked jury, or had his conviction reversed on appeal. Rather, the issue is whether he received a fair trial resulting in a verdict worthy of confidence. *Id.*

Counsel's unreasonable conduct that allowed the court to learn that appellant previously was convicted of indecent exposure—where he was on trial for indecent exposure—devastated the defense. This inadmissible evidence pervaded the entire trial—it was emphasized four times during a trial that lasted less than three hours with only two witnesses whose testimony spanned only 58 pages (1 R.R. 4, 8-66). The case turned on whether the court believed appellant's testimony that he was urinating and not masturbating. Evidence of his prior conviction destroyed the credibility of his denial. As the trial court stated, the verdict "boiled down to credibility" (1 R.R. 77). This Court cannot have confidence in the verdict in light of counsel's deficient performance.

Accordingly, this case presents one of the rare occasions where, on direct appeal and in the absence of a motion for new trial, an appellate court must conclude that counsel was ineffective because no plausible strategy could justify conduct that resulted in clear, extreme prejudice. This Court must set aside the judgment and remand for a new trial. *Menchaca, supra; Robertson, supra; Andrews, supra; Stone, supra; Mares, supra; Storr, supra*.

CONCLUSION

This Court must vacate the judgment of conviction and issue an appellate acquittal or, alternatively, remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I served a copy of this brief on Cory Stott, assistant district attorney for Harris County, by electronic service on January 12, 2021.

/s/ Josh Schaffer
Josh Schaffer

CERTIFICATE OF COMPLIANCE

I certify that, according to the word count of the computer program used to create this document, it contains 7,419 words, excluding the cover page, table of contents, table of authorities, certificate of service, and certificate of compliance.

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